

ESTTA Tracking number: **ESTTA4933**

Filing date: **01/21/2004**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

<b>Proceeding</b>	91158447
<b>Party</b>	Defendant Gapardis, Inc. Gapardis, Inc. 7494 NW 54th Street Miami, FL 33166
<b>Correspondence Address</b>	Scott R. Austin Arnstein & Lehr Suite 600 515 N. Flagler Drive West Palm Beach, FL 33401-4323
<b>Submission</b>	Answer
<b>Filer's Name</b>	Scott R. Austin
<b>Filer's e-mail</b>	sraustin@arnstein.com
<b>Signature</b>	/SRA/
<b>Date</b>	01/21/2004
<b>Attachments</b>	GapardisAnswer.PDF ( 22 pages )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 76/449823  
Published in the Official Gazette on September 23, 2003

GAPARDIS HEALTH & BEAUTY, INC.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91158447
	)	
GAPARDIS, INC.,	)	
	)	
Applicant.	)	

**ANSWER TO NOTICE OF OPPOSITION**

Applicant GAPARDIS, INC. ("Applicant"), by and through its attorneys, hereby answers the Notice of Opposition filed by GAPARDIS HEALTH & BEAUTY, INC. ("Opposer") as follows:

1. Answering paragraph 1 of the stated grounds of the opposition, Applicant lacks sufficient information to enable it to form a belief as to the truth of the allegations concerning Opposer's corporation and business, and on that basis denies the same.
2. Answering paragraph 2 of the stated grounds of the opposition, Applicant admits the allegations contained in that paragraph.
3. Answering paragraph 3 of the stated grounds of the opposition, Applicant denies Opposer's allegations.
4. Answering paragraph 4 of the stated grounds of the opposition, Applicant lacks sufficient information to enable it to form a belief as to the truth of the allegations concerning the Opposer's corporation and business, and on that basis denies the same.

5. Answering paragraph 5 of the stated grounds of the opposition, Applicant lacks sufficient information to enable it to form a belief as to the truth of the allegations concerning the referenced agreement, Opposer's corporation and business, and on that basis denies the same.

6. Answering paragraph 6 of the stated grounds of the opposition, Applicant lacks sufficient information to enable it to form a belief as to the truth of the allegations concerning the use of Opposer's name, its mark, if any, and its services, and on that basis denies the same.

7. Answering paragraph 7 of the stated grounds of the opposition, Applicant denies Opposer's allegations.

8. Answering paragraph 8 of the stated grounds of the opposition, Applicant denies Opposer's allegations.

9. Answering paragraph 9 of the stated grounds of the opposition, Applicant denies Opposer's allegations.

### **AFFIRMATIVE DEFENSES**

By way of further answer, and/or as affirmative defenses, Applicant alleges as follows:

#### **First Affirmative Defense -Failure to State a Claim**

1. Opposer has failed to state a claim upon which relief can be granted.

#### **Second Affirmative Defense - No Likelihood of Confusion**

2. There is no likelihood of confusion between Applicant's mark as used in connection with Applicant's services and Opposer's mark as used in connection with Opposer's goods and services.

### **Third Affirmative Defense - Breach of Contract**

3. Opposer has violated the face and terms of that certain July 2001 stock purchase agreement entered into with Applicant, by the disclosure of the existence and terms of that agreement.

### **Fourth Affirmative Defense - Fraud**

4. In the Opposition, Opposer represented that there was no agreement between the parties that Opposer change its business name or discontinue its use of the mark GAPARDIS.

5. In fact, Opposer expressly promised Applicant to change Opposer's business name and to discontinue Opposer's use of the mark GAPARDIS. See July 25, 2001 letter from corporate counsel for Applicant, Margaret Hesford, to counsel for Opposer, a copy of which is attached hereto as Exhibit "A."

6. On April 25, 2002, Applicant advised Opposer that it had come to Applicant's attention that Opposer was still using the business name and mark GAPARDIS. See April 25, 2002 correspondence from counsel for Applicant to counsel for Opposer, a copy of which is attached hereto as Exhibit "B."

7. On April 29 and 30, 2002, counsel for Opposer responded to the correspondence from counsel for Applicant. See April 29 and 30, 2002 correspondence from counsel for Opposer to counsel for Applicant, copies of which are attached hereto as composite Exhibit "C."

8. On April 30, 2002, counsel for Applicant responded to the correspondence from counsel for Opposer. See April 30, 2002 correspondence from counsel for Applicant to counsel for Opposer, a copy of which is attached hereto as Exhibit "D."

9. On April 30, 2002, counsel for Opposer responded to the correspondence from counsel for Applicant. See April 30, 2002 correspondence from counsel for Opposer to counsel for Applicant, a copy of which is attached hereto as Exhibit "E."

10. On April 30, 2002, counsel for Applicant responded to the correspondence from counsel for Opposer. See April 30, 2002 correspondence from counsel for Applicant to counsel for Opposer, a copy of which is attached hereto as Exhibit "F."

11. Correspondence between counsel for the parties in July 2001 confirmed that attorney Maria Gralia was indeed authorized to act on behalf of Opposer in the stock purchase matter. See correspondence between counsel for the parties, copies of which are attached hereto as composite Exhibit "G."

12. In fact, counsel for Opposer expressly advised, prior to Opposer's express agreement to change its business name and to discontinue its use of the mark GAPARDIS, that attorney Gralia "would carry the flag on this file". See July 16, 2000 correspondence from counsel for Opposer to counsel for Applicant, a copy of which is attached hereto as Exhibit "H."

13. This was confirmed in the correspondence from counsel for Applicant in response to the July 16 correspondence of counsel for Opposer. See correspondence from counsel for Applicant to counsel for Opposer, a copy of which is attached hereto as Exhibit "I."

14. Attorney Maria Gralia was thus certainly authorized to confirm, on behalf of Opposer, Opposer's agreement to change its business name and to discontinue its use of the mark GAPARDIS.

15. Opposer therefore misrepresented that there was no agreement between the parties that Opposer change its business name or discontinue its use of the mark GAPARDIS.

16. Opposer also misrepresented that Applicant has tolerated Opposer's use of the GAPARDIS name and mark for more than three and a half years without demand or complaint.

17. Opposer further misrepresented that it has or had any actual right to use the mark in commerce, and that Applicant had actual knowledge of such non-existent right.

18. In addition, Opposer misrepresented that Applicant's application (hereafter the "Application") is void for fraud due to Opposer's non-existent right to use the mark in commerce.

19. These misrepresentations were made intentionally, wilfully and maliciously.

20. These misrepresentations were and are false.

21. These misrepresentations were known to be false when made.

22. Opposer made these misrepresentations intending that the Board rely upon said misrepresentations in ruling on the Opposition.

23. The Board should expect to be able to rely upon Opposer's representations, actually misrepresentations.

24. Moreover, Applicant relied on Opposer's agreement to change its business name and to discontinue its use of the mark GAPARDIS, including, but not limited to, in filing the Application.

25. Applicant justifiably and reasonably relied upon Opposer's agreement to change its business name and to discontinue its use of the mark GAPARDIS, as documented in the correspondence attached hereto.

26. Opposer's misrepresentations, as detailed hereinabove, were thus intended to damage Applicant.

27. Applicant has been damaged, including, but not limited to, by being required to respond to Opposer's unfounded Opposition to the Application.

**Fifth Affirmative Defense - Estoppel**

28. Opposer expressly agreed to change its business name and discontinue its use of the mark GAPARDIS.

29. Opposer undertook this agreement wilfully, culpably, or negligently.

30. Applicant reasonably relied upon Opposer's agreement.

31. Opposer now fraudulently attempts to claim that there was no agreement between the parties that Opposer change its business name or discontinue its use of the mark GAPARDIS.

32. Having expressly agreed to change its business name and discontinue its use of the mark GAPARDIS, Opposer is estopped to now deny that agreement.

**Sixth Affirmative Defense - Unclean Hands**

33. Opposer has come before the Board with unclean hands and has exhibited blatant bad faith; therefore any and all claims for equitable relief should be denied.

**PRAYER FOR RELIEF**

WHEREFORE, Applicant requests judgment dismissing Opposer's Notice of Opposition and this proceeding in its entirety and ordering registration of the mark

GAPARDIS to Applicant and such other and further relief as the Board deems just and proper.

DATED this 21<sup>st</sup> day of January, 2004.

ARNSTEIN & LEHR LLP



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Scott R. Austin  
ARNSTEIN & LEHR LLP  
Attorneys for Applicant  
2424 N. Federal Highway  
Suite 462  
Boca Raton, Florida 33431  
(561) 322-6920  
(561) 322-6940 fax




**CERTIFICATE OF SERVICE**

I, Scott R. Austin, hereby certify that the above **Answer to Notice of Opposition** was served on Opposer's counsel by depositing same with the U.S. Postal Service, first-class postage prepaid, on January 21, 2004, addressed as follows:

**David M. Rogero, Esq.**  
2600 Douglas Road  
Suite 600  
Coral Gables, Florida 33134

Dated this 21st day of January, 2004.

  
\_\_\_\_\_  
Scott R. Austin

**A. MARGARET HESFORD, P.A.**

Attorney at Law  
5648 West Atlantic Boulevard  
Margate, Florida 33063

---

Telephone: 954-972-0901  
Facsimile: 954-956-0907  
AMHPA@herald.infi.net  
www.amhpa.com

A. Margaret Hesford

July 25, 2001

**Via facsimile transmission**  
**305-371-8011**

Maria A. Gralia, Esq.  
Catlin, Saxon et al.  
169 East Flagler Street  
Suite 1700  
Miami, Florida 33131

**Re: Sale of stock of Gapardis Health & Beauty, Inc.**  
**Our file number 01-113**

---

Dear Maria:

This will confirm the following agreement between our clients, as a part of the above-referenced transaction:

Your client, Michel Farah, by and on behalf of himself and Gapardis Health & Beauty, Inc., including all related parties, such as Tanios Saba, has agreed to permanently relinquish use of the "Gapardis" name, whether alone or in conjunction with other words, such as "Gapardis Health & Beauty, Inc."

My client has agreed to allow your client sixty (60) days to change all business operations, for example, mailing addresses, bank accounts, invoices, etc. from using "Gapardis Health & Beauty, Inc." to whichever name he wishes to use in its place. My client has also agreed, for a period of time of two (2) years from today, July 25, 2001, not to use the name "Gapardis Health & Beauty, Inc." in conjunction with cosmetics. Thereafter, my client is free to use the name "Gapardis Health & Beauty, Inc." in any context whatsoever, and is free, from today forward, to use the name "Gapardis Health & Beauty, Inc." other than in conjunction with cosmetics. If this does not accurately reflect our understanding, please advise.

Thank you and your client for your cooperation and assistance.

Yours sincerely,

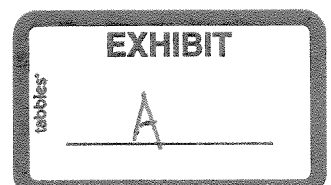
A. MARGARET HESFORD, P.A.



A. Margaret Hesford

AMH:bbc

cc: Abdallah El Ghandour  
Gapardis, Inc.



**A. MARGARET HESFORD, P.A.**

Attorney at Law  
5648 West Atlantic Boulevard  
Margate, Florida 33063

---

Telephone: 954-972-0901  
Facsimile: 954-956-0907  
AMHPA@herald.infi.net  
www.AMHPA.com

A. Margaret Hesford

**FACSIMILE COVER SHEET**

DATE OF TRANSMISSION: July 25, 2001

TIME OF TRANSMISSION: 5:05 p.m.

TO: NAME: Maria A. Gralia, Esq.

COMPANY/FIRM: Catlin, Saxon, et al.

CITY/STATE: Miami, Florida

FACSIMILE NUMBER: 305-371-8011

FROM: A. Margaret Hesford, Esq.

OUR FILE NO.: 01-113

MESSAGE: Please see enclosed.

---

WE ARE TRANSMITTING TWO PAGES, INCLUDING THIS COVER SHEET. IF TRANSMISSION IS INCOMPLETE, PLEASE CALL BRENDA AT 954-972-0901.

**WARNING** - THE INFORMATION CONTAINED IN THIS FACSIMILE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE NAMED RECIPIENT(S). THIS MESSAGE MAY CONTAIN PRIVILEGED ATTORNEY/CLIENT COMMUNICATIONS OR ATTORNEY WORK PRODUCT AND IS THEREFORE INTENDED TO BE CONFIDENTIAL. IF THIS FACSIMILE TRANSMISSION HAS BEEN SENT TO THE WRONG FACSIMILE TELEPHONE NUMBER AND/OR NOT DELIVERED TO THE DESIGNATED AND INTENDED RECIPIENT AND/OR IF YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, PLEASE CONTACT US IMMEDIATELY. WE WILL ARRANGE FOR PROMPT RETURN OF THE DOCUMENT AT NO EXPENSE TO YOU. THANK YOU FOR YOUR COOPERATION.

The original will: ☐ be sent via United States mail  
☐ be sent via express mail  
☒ not be sent

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

TX/RX NO	0987	
CONNECTION TEL		305 371 8011
SUBADDRESS		
CONNECTION ID		
ST. TIME	07/25 17:01	
USAGE T	00'27	
PGS. SENT	2	
RESULT	OK	

**Steve Kolski, Domin, Gapardis Health & Beauty, Inc.**

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To: Steve Kolski, Dominique Bouchetob  
From: "A. Margaret Hesford" <amhpa@herald.infi.net>  
Subject: Gapardis Health & Beauty, Inc.  
Cc:  
Bcc:  
Attached:

April 25, 2002; 10:40 a.m.

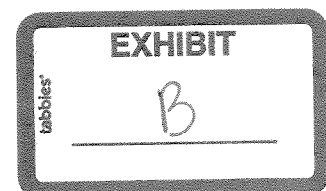
Dear Steve:

It has come to my client's attention that your client is still using the name Gapardis, contrary to the agreement between the parties, specifically with the preparer of payroll. We would appreciate it if you would contact your client in this regard.

Thank you for your cooperation in this matter.

Yours sincerely,

A. Margaret Hesford



From: SteveKolski <stevekolski@catlin-saxon.com>  
To: "'A. Margaret Hesford'" <amhpa@herald.infi.net>  
Subject: RE: Gapardis Health & Beauty, Inc.  
Date: Mon, 29 Apr 2002 09:09:23 -0400  
X-Mailer: Internet Mail Service (5.5.2650.21)

I will pass this inquiry on to the client.

Regarding the "agreement," is it in writing and, if so, please fax me a copy of the written agreement.

Steve Kolski  
Catlin Saxon Evans Fink & Kolski, P.A.  
1700 DuPont Building  
169 East Flagler Street  
Miami, FL 33131  
Telephone: (305) 371-9575  
Facsimile: (305) 371-8011  
E-mail: stevekolski@catlin-saxon.com

-----Original Message-----

From: A. Margaret Hesford [mailto:amhpa@herald.infi.net]  
Sent: Thursday, April 25, 2002 10:57 AM  
To: stevekolski@catlin-saxon.com; Gapardis@bellsouth.net  
Subject: Gapardis Health & Beauty, Inc.

April 25, 2002; 10:40 a.m.

Dear Steve:

It has come to my client's attention that your client is still using the name Gapardis, contrary to the agreement between the parties, specifically with the preparer of payroll. We would appreciate it if you would contact your client in this regard.

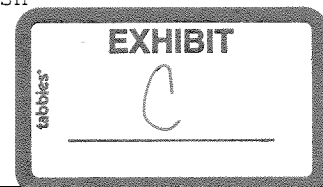
Thank you for your cooperation in this matter.

Yours sincerely,

A. Margaret Hesford

A. Margaret Hesford, P.A.  
5648 West Atlantic Boulevard  
Margate, Florida 33063  
Telephone: 954-972-0901  
Facsimile: 954-956-0907  
<AMHPA@herald.infi.net>  
www.AMHPA.com

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From: SteveKolski <stevekolski@catlin-saxon.com>  
To: "'amhpa@herald.infi.net'" <amhpa@herald.infi.net>  
Subject: Gapardis Health and Beauty, Inc. d/b/a Mitchell Group  
Date: Tue, 30 Apr 2002 11:09:42 -0400  
X-Mailer: Internet Mail Service (5.5.2650.21)

April 30, 2002

Dear Ms. Hesford:

You have not supplied me with a copy of any written agreement regarding the name change. I trust none exists.

GHBI does business as Mitchell Group, but has not nor does it intend to change its corporate name.

My client has inquired if your client is now ready to do the honorable thing and reimburse my client for expenses incurred on the American Express card. Please advise.

Steve Kolski  
Catlin Saxon Evans Fink & Kolski, P.A.  
1700 DuPont Building  
169 East Flagler Street  
Miami, FL 33131  
Telephone: (305) 371-9575  
Facsimile: (305) 371-8011  
E-mail: stevekolski@catlin-saxon.com

**SteveKolski, Re: Gapardis Health and Beauty**

---

To: SteveKolski <stevekolski@catlin-saxon.com>, Dominique Bouchetob  
From: "A. Margaret Hesford" <amhpa@herald.infi.net>  
Subject: Re: Gapardis Health and Beauty, Inc. d/b/a Mitchell Group  
Cc:  
Bcc:  
Attached:

April 30, 2002; 11:35 a.m.

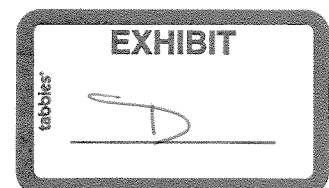
Dear Steve:

I have not previously supplied anything in writing, because I just returned to the office from New York. On July 25, 2001, I wrote a facsimile letter to Maria Gralia confirming your client's agreement as discussed. If you need another copy faxing over, please have your assistant call mine.

As far as the American Express reimbursement to my client for moneys owed by your client, I have no information suggesting that status has changed. However, I will forward your e-mail and respond when I hear from my client.

Yours sincerely,

A. Margaret Hesford





From: SteveKolski <stevekolski@catlin-saxon.com>  
To: "'A. Margaret Hesford'" <amhpa@herald.infi.net>  
Subject: RE: Gapardis Health and Beauty, Inc. d/b/a Mitchell Group  
Date: Tue, 30 Apr 2002 11:53:05 -0400  
X-Mailer: Internet Mail Service (5.5.2650.21)

Please send me the written agreement referenced below. Note, a "confirming" letter from you to Maria would not appear to be binding on the parties absent evidence to support the authority of the agent sending the letter and the agent receiving the letter to bind the principals.

Steve Kolski  
Catlin Saxon Evans Fink & Kolski, P.A.  
1700 DuPont Building  
169 East Flagler Street  
Miami, FL 33131  
Telephone: (305) 371-9575  
Facsimile: (305) 371-8011  
E-mail: stevekolski@catlin-saxon.com

-----Original Message-----

From: A. Margaret Hesford [mailto:amhpa@herald.infi.net]  
Sent: Tuesday, April 30, 2002 12:01 PM  
To: SteveKolski; Gapardis@bellsouth.net  
Subject: Re: Gapardis Health and Beauty, Inc. d/b/a Mitchell Group

April 30, 2002; 11:35 a.m.

Dear Steve:

I have not previously supplied anything in writing, because I just returned to the office from New York. On July 25, 2001, I wrote a facsimile letter to Maria Gralia confirming your client's agreement as discussed. If you need another copy faxing over, please have your assistant call mine.

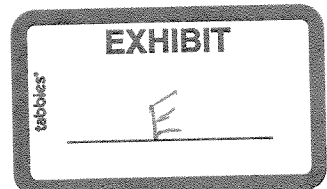
As far as the American Express reimbursement to my client for moneys owed by your client, I have no information suggesting that status has changed. However, I will forward your e-mail and respond when I hear from my client.

Yours sincerely,

A. Margaret Hesford

A. Margaret Hesford, P.A.  
5648 West Atlantic Boulevard  
Margate, Florida 33063  
Telephone: 954-972-0901  
Facsimile: 954-956-0907  
<AMHPA@herald.infi.net>  
www.AMHPA.com

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**SteveKolski, RE: Gapardis Health and Beauty**

---

To: SteveKolski <stevekolski@catlin-saxon.com>, Dominique Bouchetob  
From: "A. Margaret Hesford" <amhpa@herald.infi.net>  
Subject: RE: Gapardis Health and Beauty, Inc. d/b/a Mitchell Group  
Cc:  
Bcc:  
Attached:

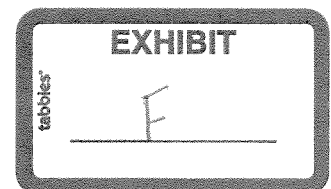
April 30, 2002; 12:30 p.m.

Dear Steve:

I could hardly be surprised that, eight months after the fact, it would appear there is an attempt to avoid confirmation of the agreement between the parties. I do find it surprising, however, that you would try to suggest that Maria was not authorized to make this agreement, which she specifically confirmed with the client, and particularly since the letter expressly states this is the accurate agreement absent advises at that time, of which there were none. Regardless, I do not intend to get into another round of e-mails with you. The letter confirms the agreement. If your client chooses to disregard it, we will consider our alternatives, but repeated e-mails is not one of those unless you are advising that your client is now prepared to abide by its agreement.

Yours sincerely,

A. Margaret Hesford



**Maria Gralia, Stock purchase, exhibit A, and**

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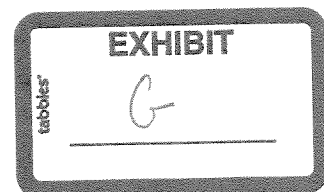
To: Maria Gralia  
From: "A. Margaret Hesford" <amhpa@herald.infi.net>  
Subject: Stock purchase, exhibit A, and expiration  
Cc:  
Bcc:  
Attached:

I received the agreement, signed by all parties except Swift Creek and Gapardis. However, I have not received the revised exhibit A.

During our conversation, you represented that the expired merchandise had been revalidated; please both forward documentation regarding same and ask your client how that affects the notation on the tube of merchandise which says "expired".

Upon receipt of the foregoing, I will forward same to my client. However, and as before, I urge you to have your client contact mine. The issue of merchandise can only be resolved by the parties themselves, since they know about the merchandise and the implications thereto. Moreover, any amendments to exhibit A have previously been agreed between them, though not as far as expired -- and therefore unsaleable -- merchandise is concerned. At this juncture, we have an agreement to sell stock for merchandise; of course, the merchandise would have to be saleable, as opposed to expired.

Thank you for your cooperation.



## SteveKolski, Executed agreements

---

To: SteveKolski <stevekolski@catlin-saxon.com>  
From: "A. Margaret Hesford" <amhpa@herald.infi.net>  
Subject: Executed agreements  
Cc:  
Bcc:  
Attached:

It is now 6:00 p.m., and having not received the courtesy of a call back on the status of the executed agreements, I called your office to learn that both you and Maria Gralia had left for the weekend, without even calling me. I had told Maria Gralia that I was waiting for the agreements, which she said would be coming to me; apparently that representation, as so many others, did not come to pass.

I will be in my office on Monday morning. Please ensure I promptly receive the agreement executed by my client and yours.

## Maria Gralia, Stock purchase

---

To: Maria Gralia  
From: "A. Margaret Hesford" <amhpa@herald.infi.net>  
Subject: Stock purchase  
Cc:  
Bcc:  
Attached:

It is now 6:25 p.m. and I have not heard from you. I look forward to hearing from you in the morning.

Incidentally, we have not completed the inventory of the merchandise, thus cannot confirm that what was received is what is on the invoice.

Until tomorrow.

From: SteveKolski <stevekolski@catlin-saxon.com>  
To: "'A. Margaret Hesford'" <amhpa@herald.infi.net>  
Subject: RE: Executed agreements  
Date: Mon, 16 Jul 2001 09:08:52 -0400  
X-Mailer: Internet Mail Service (5.5.2650.21)

I told you early afternoon that Maria would carry the flag on this file.  
Why pester me with your e-mail. It all ends up in the same place -- the  
trash.

Steve Kolski  
Catlin Saxon Tuttle Evans Fink & Kolski, P.A.  
1700 DuPont Building  
169 East Flagler Street  
Miami, FL 33131  
Telephone: (305) 371-9575  
Facsimile: (305) 371-8011  
E-mail: stevekolski@catlin-saxon.com

-----Original Message-----

From: A. Margaret Hesford [mailto:amhpa@herald.infi.net]  
Sent: Friday, July 13, 2001 6:07 PM  
To: SteveKolski  
Subject: Executed agreements

It is now 6:00 p.m., and having not received the courtesy of a call  
back  
on the status of the executed agreements, I called your office to learn  
that both you and Maria Gralia had left for the weekend, without even  
calling me. I had told Maria Gralia that I was waiting for the agreements,  
which she said would be coming to me; apparently that representation, as so  
many others, did not come to pass.

I will be in my office on Monday morning. Please ensure I promptly  
receive the agreement executed by my client and yours.



**SteveKolski, RE: Executed agreements**

---

To: SteveKolski <stevekolski@catlin-saxon.com>  
From: "A. Margaret Hesford" <amhpa@herald.infi.net>  
Subject: RE: Executed agreements  
Cc:  
Bcc:  
Attached:

No, you did not indicate you were passing the "flag" to Maria. If that was so, why were we speaking until the evening. Regardless, I wish I was surprised by your rudeness, but sadly not.

